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Supreme Court of the United States

OCTOBER TERM, 1945.

CHARLES M. CROWHURST, P. JAMES CROWHURST, HARRY L. CROWHURST, WINTHROPE A. CROWHURST, ELLEN CROWHURST, SARAH CROWHURST, ETHYLE W. KAPLAN, LILLIAN A. KAPLAN, Individually, LILLIAN A. KAPLAN, as trustee for Esther R. Kaplan, Ilene A. Kaplan and Herbert E. Kaplan, EMILY R. KAPLAN, individually and EMILY R. KAPLAN, as trustee for Jean F. Kaplan, Edward K. Kaplan and Sylvia R. Kaplan, partners trading as A. J. CROWHURST & SONS,

Petitioners,

vs.

JOSEPH GRASSO,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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Petitioners,

vs.

JOSEPH GRASSO,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioners, CHARLES M. CROWHURST, P. JAMES CROWHURST, HARRY L. CROWHURST, WINTHROPE A. CROWHURST, ELLEN CROWHURST, SARAH CROWHURST, ETHYLE W. KAPLAN, LILLIAN A. KAPLAN, Individually, LILLIAN A. KAPLAN, as trustee for Esther R. Kaplan, Ilene A. Kaplan and Herbert E. Kaplan, EMILY R. KAPLAN, Individually, and EMILY R. KAPLAN, as trustee for Jean F. Kaplan, Edward K. Kaplan and Sylvia R. Kaplan, partners trading as A. J. CROWHURST & SONS, pray that a Writ of Certiorari issue to review the order of the United States Circuit Court

of Appeals for the Third Circuit reversing the order of the United States District Court for the District of New Jersey, which dismissed the respondent's petition for an order that the petitioners be directed to restore the respondent to the position held by him in the employ of the petitioners at the time of his induction into the armed services of the United States. The said petition in the District Court had been brought on pursuant to the provisions of the Selective Training and Service Act of 1940, Title 50, App. U. S. C. A. Sec. 308.

Summary Statement.

At the time in question. (October 1943), Section 308 (b) provided that a person who had left his employ in order to perform training and service in the armed services, was entitled to restoration to his position upon his discharge provided

(1) that he received an honorable discharge;

(2) that he is still qualified to perform the duties of such position;

(3) that he makes application for re-employment within forty days after he is relieved from such training and service.

The petitioners are co-partners and as such conduct a tannery under the trade name of A. J. Crowhurst & Sons in Belleville, New Jersey. For some years prior thereto and at the time of his induction into the United States Army, the respondent had been employed as a tacker in the plant currently owned and operated by the petitioners. The respondent was discharged from the United States Army on Oc-

tober 5, 1943 (A12a) because of a physical disability (A35a). On October 29, 1943, he visited the office of the petitioners, and in a conversation with Charles M. Crowhurst, one of the petitioners, requested an indefinite leave of absence (A23a, 34a, 35a).

At that time an agreement existed between the petitioners and Local 27, International Fur and Leather Workers' Union, the collective bargaining agent of the petitioners' employees, that no indefinite leaves of absence would be granted under any conditions, and that leaves of absence for a definite period would be granted only upon the recommendation of the company physician (A39a, Exhs. R-4, R-5). Accordingly, the respondent's request for an indefinite leave of absence was refused and he was advised that a leave of absence for a definite period would be granted only if recommended by a Dr. Crecca, the company physician (A35a, 37a). The respondent thereafter submitted to an examination by Dr. Crecca, who pronounced him unable to work as a tacker because of his physical disability (A38a). A few days later the respondent again visited the petitioners' plant. On that occasion he requested a release so as to secure employment elsewhere but was advised that a release was unnecessary (37a, 38a). No further discussions relative to the respondent's re-employment by the petitioners were had at any time within forty days following upon the respondent's discharge from the United States Army.

On June 12, 1944, approximately eight months after his discharge from the Army, the respondent instituted a proceeding in the United States District Court of New Jersey for an order seeking to compel the petitioners to reinstate

the respondent to the position held by him at the time of his induction into the armed forces (A3a-7a).

The petitioners, in their Answer, asserted that:

> (1) the respondent was not physically qualified to perform the duties incident to such position, and
>
> (2) he had not made application for re-employment within the meaning and intent of the Selective Training and Service Act, within forty days after he had been relieved from military service (A8a-10a).

At the trial it was admitted that there were only two conversations between Crowhurst and Grasso during the forty day period following upon the latter's discharge from the Army (A21a). It was further admitted that on the occasion of the first conversation Grasso had not indicated either a desire or a willingness to return to work, but had requested a leave of absence for an indefinite period of time (A25a). The same was admittedly refused and Grasso was sent to Dr. Crecca in order to determine whether a leave of absence for even a definite period of time should be granted to him. It was further conceded that Dr. Crecca found Grasso physically unqualified to perform the duties of a tacker and so advised both him and Crowhurst (A13a, 38a). The trial then proceeded on the theory fully developed by the respondent herein (A51a) and assumed by both sides to exist, that Grasso's application for a leave of absence had been refused (Finding of Fact No. 19). For the purposes of this petition the second conversation is unimportant, because although an issue was raised at the trial relative to the same, the Circuit Court of Appeals did not dis-

turb the Finding of Fact made by the trial court to the effect that in the second conversation Grasso had merely requested a release.

The trial court rendered an opinion (A52a-61a) in which it found as follows:

> (a) that the respondent was not disqualified from performing the duties of his position as a tacker (A54a),
>
> (b) that the respondent at no time within a period of forty days from the date of his discharge from the armed forces requested re-employment by the petitioners (A61a),
>
> (c) that the respondent's request for a leave of absence did not constitute an application for re-employment within the purview of the Selective Training and Service Act of 1940 (A58a, 59a).

Findings of Fact consistent therewith were made by the trial court and an order was entered dismissing the petition (A62a).

The respondent filed a notice of appeal to the Circuit Court of Appeals for the Third Circuit and in connection with said appeal, and pursuant to Rule 75 (d) of the Federal Rules of Civil Procedure, served and filed a statement of the points intended to be urged on the appeal together with a designation of the contents of record on appeal. The transcript of the record was prepared in accordance therewith and all testimony and exhibits not related to the matters urged in the Statement of Points, were properly omitted therefrom. In the brief filed by the appellant in the Circuit Court of Appeals it was specifically set forth that the only question involved on the appeal was as follows:

"Does application for leave of absence constitute application for re-employment within the meaning of Section 8 (b) (3) of the Selective Training and Service Act, 54 Stat. 885, U. S. C. A. Title 50 App. Sec. 309 (b) (3)."

The Circuit Court of Appeals answered the said question in the affirmative and reversed the order made by the trial court. Moreover, in the opinion rendered by the Circuit Court of Appeals in connection with the said reversal, Finding of Fact No. 19 made by the trial court was set aside, although no issue relative to the propriety of the same had been taken by the appellant either in his Statement of Points or in his brief, and which fact, as found by the trial court, was not only correctly assumed to exist by all of the litigants at the trial, but in addition thereto had been fully developed and urged by the appellant.

Jurisdiction.

This court has jurisdiction under Judicial Code, Section 240, Subdivision (a). This petition for a Writ of Certiorari is timely, as the decision of the Circuit Court of Appeals was rendered on February 26, 1946.

Questions Involved.

(1) Does an application for a leave of absence constitute an application for re-employment within the meaning of Section 308 (b) (3) of the Selective Training and Service Act of 1940, Title 50, App. U. S. C. A.?

(2) Is it proper for a Circuit Court of Appeals to set aside a Finding of Fact, the correctness of which is as-

sumed to exist by all of the litigants and is therefore not controverted at the trial; and which fact is consistent with and invited by the position taken at the trial by the appellant; and relative to the propriety of which no issue is taken by the appellant either in the Statement of Points or in the brief submitted by him to the Circuit Court?

Reasons Relied Upon for the Allowance of the Writ.

A. As to Question No. 1. The construction of the phrase "makes application for re-employment", as intended by Congress in the enactment of the Selective Training and Service Act, presents a question of Federal law which has not been, but should be, settled by this court. The importance thereof is a matter of national significance affecting millions of veterans.

B. As to Question No. 2. The Circuit Court of Appeals for the Third Circuit, in setting aside a Finding of Fact determined by the trial court under the circumstances inherent in the trial of this case, has decided an important question of Federal law contrary to the decisions of this court and in conflict with decisions of other Circuits. See: *Brown* v. *Gurney*, 201 U. S. 184; *Baker* v. *Kaiser*, 126 Fed. 317 (8th Cir.); *Rosaly* v. *Gonzales*, 106 F. (2d) 169 (1st Cir.); *Mutual Benefit Health & Accident Assn.* v. *Warrell*, 96 F. (2d) 447 (8th Cir.); *Pitcairn* v. *Fisher*, 78 F. (2d) 649 (8th Cir.); *U. S.* v. *National City Bank of N. Y.*, 281 Fed. 754 (2nd Cir.); *Southern Pacific Co.* v. *Hall*, 100 F. 760 (9th Cir.); *Southern Cotton Oil Co.* v. *Shelton*, 220 F. 247 (4th Cir.).

WHEREFORE, your petitioners respectfully pray that this petition for a Writ of Certiorari to review the order heretofore made herein by the Circuit Court of Appeals for the Third Circuit, be granted.

Dated: New York, May 14, 1946.

CHARLES M. CROWHURST, P. JAMES CROWHURST, HARRY L. CROWHURST, WINTHROPE A. CROWHURST, ELLEN CROWHURST, SARAH CROWHURST, ETHYLE W. KAPLAN, LILLIAN A. KAPLAN, Individually, LILLIAN A. KAPLAN, as trustee for Esther R. Kaplan, Ilene A. Kaplan and Herbert E. Kaplan, EMILY R. KAPLAN, Individually, and EMILY R. KAPLAN, as trustee for Jean F. Kaplan, Edward K. Kaplan and Sylvia R. Kaplan, partners trading as A. J. CROWHURST & SONS.

By CLARENCE FRIED,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

Statement.

The basic facts are set forth in the foregoing petition. So far as may be necessary, further facts will be discussed in connection with the argument.

POINT I.

A request for a leave of absence does not constitute an application for reemployment within the meaning and purview of Section 308 (b) (3) of the Selective Training and Service Act of 1940.

The trial court found and the Circuit Court did not disturb the finding that the ~~petitioner~~ respondent had merely requested a leave of absence. The error committed by the Circuit Court in setting aside the finding of the trial court to the effect that the requested leave of absence had been refused, is dwelt upon in Point II hereof. However, conceding for the purposes of this Point that there may be some question as to whether there is sufficient evidence in the record to support the finding that the request for a leave of absence had been refused—there is nonetheless not a single word in the record which either directly or inferentially would permit of the conclusion that the request for a leave of absence—had been granted. This is not disputed in the opinion rendered by the Circuit Court. Therefore, adopting the most favorable view of the record to the position taken by the Circuit Court, we still are met with the undisputed fact

that, at best, the respondent had merely requested a leave of absence which although perhaps not expressly refused —was nonetheless, most certainly—not granted. Accordingly, this Point is confined to the question as to whether a request for a leave of absence, standing alone, is an application for reemployment within the purview of Section 308 (b) (3) of the Selective Training and Service Act of 1940.

The trial court held that the same was not an application for reemployment (A58a, 59a). The Circuit Court, in referring to the said conclusion of the trial court, said as follows:

> "This we think is a far too narrow construction of the statutory language * * * makes application for re-employment".

Therefore, the issue revolves itself about what was Congressional intent in the use of the phrase "makes application for re-employment". The answer lies both in the context of the Statute and in the purposes and objectives which motivated its enactment.

In speaking of the context of the Statute, attention is respectfully directed to the fact that Section 308 (c) and (d) of the Act specifically states that an employee shall be considered as having been on "furlough or leave of absence during his period of training and service". Therefore, unless 'distortion' rather than 'construction' is intended, how can it possibly be urged that in using the phrase "application for re-employment" Congress intended that the same could be accomplished by a request for a leave of absence when the Act itself states that that is

the status of the employee during the period of his training and service? A mere understanding of the English language hardly approaching the dignity of construction, permits of no conclusion other than that Congress, in using the phrase "application for re-employment", meant the resumption of active service as an employee as distinguished from the leave of absence status existent during the period of his training and service in the armed forces.

Moreover, aside from the literal interpretation of the language used in the Statute, any construction thereof must be resolved in the light of that which was sought to be accomplished by its enactment.

Although the Act protected those serving in the armed forces, it was intended to give creation to a "shield" as distinguished from a "sword". As stated in Section 301 (b) of the Act, the objective sought to be accomplished was that "the obligations and privileges of military training should be shared generally in accordance with a fair and just system * * *." In speaking of a "fair and just system", Congress intended to give creation to an Act which would be just and fair to all persons—employer, veteran and non-veteran employees. It sought to and did accomplish its objective without subjecting employers and non-veteran employees to needless hardships. It was for that reason that the forty day limitation period was inserted in the Act. Congress appreciated that although a veteran was entitled to return to his job, the right and privilege given to the veteran was of such a nature that unless he asserted it within a reasonable period of time after his discharge, a chaotic condition might result insofar as his employer and his fellow non-veteran employees were concerned. Con-

gress defined that reasonable period as forty days from the date of discharge, and thereafter by amendment of December 8th, 1944 (not applicable to the instant case), extended the said period to ninety days. The reason for the limitation is manifest. How else could an employer know when his obligation to restore a veteran to his former position ceased? How else could a fellow non-veteran employee ever know when the security incident to his employment no longer could be impaired? Common sense, logic and the "fair and just system" sought to be achieved dictated the forty day limitation.

However, if the decision of the Circuit Court be correct that a mere "application for a leave of absence" is an "application for re-employment", does not the same destroy the limitation which logic and fairness impelled Congress to impose? If all that a veteran had to do in order to avail himself of the rights and privileges conferred upon him by the Act, was to show that he had called upon his employer within forty days from the date of his discharge and had requested a leave of absence—what would prevent him from extending the period to ten weeks, months or years? Particularly is this true, if as in the instant case, it would not be incumbent upon the veteran to affirmatively establish that the employer had acquiesced in the requested leave of absence.

No better illustration of the chaos which would result and the unfairness of the same to both the employer and fellow non-veteran employees can be found than by quoting directly from the testimony adduced during the course of the trial of this proceeding:

"A23a

Q. Now, how long a leave of absence did you ask for? A. I had no set time in mind.

Q. Well, was there any mention made of the period during which you wanted to have a leave of absence? A. No, sir.

Q. Did you ask for an indefinite leave of absence? A. Yes.

* * * * * * *

Q. Did you tell Mr. Crowhurst why you wanted a leave of absence? A. No.

Q. And he didn't ask you? A. He may have but I don't recall.

Q. But you are certain that whether he asked you or whether he didn't ask you, you didn't tell him why you wanted a leave of absence? A. I am positive.

Q. Although he might have asked you? A. He may have asked me.

* * * * * * *

A25a

Q. For how long a period of time did you want a leave of absence? A. As long as I saw fit that I wanted to take it.

Q. And that is what you told Mr. Crowhurst? A. I didn't tell him anything."

Can the foregoing possibly be in keeping with the "fair and just system" sought to be achieved by Congress?

It is respectfully submitted that if one looks to both the context of the Statute and the objectives sought to be achieved by its enactment, it permits of no other conclusion than that Congress, in using the phrase "makes application for re-employment", intended that a veteran who desired to resume his former employment would be prepared to

start working within forty days from the date of his discharge. Mere proof of the making of an application for a leave of absence—standing alone—*without either a scintilla of evidence or even the contention that the same had been granted*—in no respect approaches an application for re-employment within the meaning and purview of Section 308 (b) (3) of the Selective Training and Service Act of 1940.

POINT II.

The Circuit Court erred in setting aside the trial court's Finding of Fact No. 19 to the effect that the respondent's request for a leave of absence had been refused by the petitioners.

Throughout the trial both sides assumed that Grasso's request for a leave of absence had been refused. The same was not controverted at the trial, and furthermore, was wholly consistent with the position taken and invited by Grasso at the trial. This is best illustrated by the following testimony in the record (Re-direct examination of Grasso) (A51a):

(p. 420)

> "Q. After you asked Mr. Crowhurst for a leave of absence (p. 421) *and he told you that you couldn't get a leave of absence,* what did you tell him? What did you say? A. Well, I told him I was a veteran and the Veterans Act would help me get my job back, and he said 'Oh, it don't pertain to that. There isn't a law passed that could force me to hire you back.' And so, not to argue it, I have argued enough on the case—"

The foregoing is typical of the entire record, all of which substantiates the assumption by both sides that the requested leave of absence had been refused. No issue or controversy was taken relative to the same and the case was tried on that theory adopted by both sides. The transcript of the record does not contain all of the evidence adduced at the trial in connection with said finding because no issue relative to the propriety of the same was taken by Grasso either in the Statement of Points or in the Brief filed in his behalf in the Circuit Court. Accordingly, it not being a matter at issue in the Circuit Court, it not only was unnecessary, but moreover would have been highly improper, to burden the transcript of the record with matters not relevant to the appeal. (Rule 75 (d) of Federal Rules of Civil Procedure and Rule 26 (2) (b) of the Rules of the Circuit Court of Appeals for the 3rd Circuit).

As stated in Cyclopedia of Federal Civil Procedure, Volume XI, Section 5540:

> "A written or printed record is the basis of all ordinary modes of review by a higher court. Barring matters of which the court may take judicial notice, consideration of court of review is confined to the record which is filed therein in the particular case, and it is consequently a matter of general principle, recognized by all reviewing courts and not peculiar to Federal Courts, that the errors assigned and relied on must appear by the record and will otherwise not be inquired into or considered * * * Some error must be shown, and if none is shown, the judgment must be affirmed. More often these are but expressions of the rule that review is confined to the errors assigned, argued and apparent by the record, in that form being the statement of a

principle of review. These general rules of law are corollary to each other and too elementary to justify citations of authority, which may be found in abundance in digests."

Particularly is this true where the same involves a finding of fact made by the trial court.

Cyclopedia of Federal Civil Procedure, Volume 12, Section 6211, page 266:

> "Where a case is tried by the court, a jury having been waived, the court's findings upon questions of fact are conclusive upon appeal no matter how convincing the argument that upon the evidence, the findings should have been different, unless there is no substantial evidence to support them."

Cyclopedia of Federal Civil Procedure, Volume 12, Section 6211, page 270:

> "In the absence of a proper record, shown to contain all the evidence essential to enable the Circuit Court of Appeals to determine the correctness or incorrectness of the challenged findings, such findings cannot be questioned on review * * * and the courts have gone so far as to hold that the presumption of correctness which attached to the findings made by a trial court is sufficient to withstand an attack made upon an obviously incomplete record."

In the instant case, not only was the record incomplete, but moreover the finding was not even challenged by the appellant.

With regard to the question as to whether or not there was any substantial evidence to support the finding that the

request for a leave of absence by Grasso had been refused, can there conceivably be any better demonstration thereof than the testimony of Grasso as elicited by his own attorney (A51a)? Where then is there any "substantial error" in the lower court's finding that the request for a leave of absence had been refused?

Moreover, even if it be hypothetically assumed that there was no basis for the court's finding that the request for a leave of absence had been refused, Grasso, by reason of the fact that his counsel invited the commission of said error by the aforementioned assumption of a fact not established, is estopped from questioning the same on appeal.

Brown v. *Gurney*, 201 U. S. 184, 190; 26 Sup. Ct. 509, 511:

> "But the Supreme Court applied the rule that where the existence of certain facts is assumed in the trial court and the trial proceeds, without objections, on that assumption, and the case is decided in reliance thereon, neither party will be heard in the court of review to question there for the first time the existence of the facts. * * *"

Baker v. *Kaiser*, 126 Fed. 317, 319 (8th Cir.):

> "* * * A theory of a case or an assumption of fact adopted by a trial court with the acquiescence of the parties will be followed by an appellate court to which the cause is taken."

Southern Cotton Oil Co. v. *Shelton*, 220 F. 247 at 256 (4th Cir.):

> "On the other hand, we read the authorities as holding that it is not allowable for any party, who has taken one position on a question of fact on the

trial below, to take an inconsistent position in the appellate court."

Cyclopedia of Federal Civil Procedure, Volume 12, Section 6191, pages 135, 136:

> "A party cannot go behind admissions made by him in the lower court; and a fact or conclusion admitted by the party in his pleadings, or in the trial or hearing of the cause, or assumed by both parties to exist, is not open to be controverted or put in issue in the appellate court."

Again at page 137:

> "Federal Appellate Courts adhere to the rule that a party on appeal will not ordinarily be permitted to complain of an alleged error which he himself invited, or which at his instance or inducement the Court committed, nor of errors of like character to those thus invited or induced."

See:

Rosaly v. *Gonzales*, 106 F. (2d) 169 (1st Cir.);
Mutual Benefit Health & Accident Ass'n. v. *Warrell*, 96 F. (2d) 447 (8th Cir.);
Pitcairn v. *Fisher*, 78 F. (2d) 649 (8th Cir.);
U. S. v. *National City Bank of N. Y.*, 281 Fed. 754 (2nd Cir.);
Southern Pacific Co. v. *Hall*, 100 F. 760 (9th Cir.).

In 2 Standard Procedure, 244, 245:

> "Consistency of position is a fundamental requisite in appellate proceedings. Parties will not be permitted to take in the appellate court a course at variance with, or inconsistent with, the course fol-

lowed by them below. Where a case is heard or tried in the lower court upon a certain theory, another and different theory cannot be presented upon appeal."

It is therefore respectfully submitted that as a matter of law the Circuit Court erred in setting aside the trial court's Finding of Fact that Grasso's request for a leave of absence had been refused.

Conclusion.

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a Writ of Certiorari should be granted.

Respectfully Submitted,

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No. 110

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Petitioners,

vs.

JOSEPH GRASSO,

Respondent.

BRIEF ON BEHALF OF RESPONDENT.

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Supreme Court of the United States

OCTOBER TERM, 1945

CHARLES M. CROWHURST, P. JAMES CROWHURST, HARRY L. CROWHURST, WINTHROPE A. CROWHURST, ELLEN CROWHURST, SARAH CROWHURST, ETHYLE W. KAPLAN, LILLIAN A. KAPLAN, Individually, LILLIAN A. KAPLAN, as trustee for Esther R. Kaplan, Ilene A. Kaplan and Herbert E. Kaplan, EMILY R. KAPLAN, Individually, and EMILY R. KAPLAN, as trustee for Jean F. Kaplan, Edward K. Kaplan, and Sylvia R. Kaplan, partners trading as A. J. CROWHURST & SONS,

Petitioners,

vs.

JOSEPH GRASSO,

Respondent.

BRIEF ON BEHALF OF RESPONDENT.

Statement of Facts.

Respondent was employed by petitioners for many years, up to the time of his induction into the U. S. Army under the provisions of the Selective Training & Service Act of 1940 and Service Extension Act of 1941. He was discharged from the army on October 5, 1943. About ten days later, he called at petitioners' plant, spoke to Charles M. Crowhurst, and requested a leave of absence (A. 12a).

At that time there was in force a collective agreement between a trade union which was bargaining representative for the employees, and petitioners. This agreement covered leaves of absence and provided that they would be granted only for definite periods of time and after examination by the employer's physician (A. 35a, Exhibits R. 4, R. 5).

Crowhurst did not deny the request for leave of absence, but insisted that respondent be examined by the company doctor (A. 13a, 35a). Respondent submitted to such examination by the plant physician, Dr. Crecca, who insisted that respondent was totally unfit for work as a result of a flat foot condition (A. 13a, 14a, 38a).

Respondent again saw Crowhurst (A. 14a). Respondent testified that he asked to go to work forthwith, but the petitioners deny this (A. 15a, 36a).

Petitioners refused to reinstate respondent because of Dr. Crecca's report that respondent was unable to discharge the duties of his position (Answer to Petition, A. 9a).

In the pleadings as filed in the District Court of the United States for the District of New Jersey, the employer raised two issues:

1. That respondent was physically incapacitated from performing his duties.
2. That no application for reemployment had been made within the forty-day statutory period (Answer to Petition, A. 8a, 10a).

On the first point, the trial court found against the employer, petitioners herein (A. 54a), saying:

> "* * * he is not disqualified for his position as a tacker in [the] tannery".

On the second point, the trial court found that the request for leave of absence neither amounted to nor included a request for reemployment within the meaning of the Federal statutes above cited.

The Circuit Court of Appeals for the Third Circuit found to the contrary on that point, and ordered reinstatement. They so found on appeal, in which the sole question presented by the employee, who was the petitioner-appellant below, was:

> "Does application for leave of absence constitute application for reemployment within the meaning of Section 8 (b) (3) of the Selective Training and Service Act, 54 Stat. 885, U. S. C. A. Title 50, App. Sec. 309 (b) (3)?"

The Circuit Court of Appeals in overruling the District Court, had necessarily to rule on all the circumstances connected with the refusal of reemployment. All of these were put directly in issue on the appeal below, by the phraseology of the question there involved, as above quoted. They are also within the scope of the employee's "Statement of Points", as filed in connection with his appeal.

The Circuit Court of Appeals made no order specifically setting aside the trial court's Finding of Fact No. 19, but essentially ruled only that "Grasso had made timely application for reemployment".

The employer now seeks to review this decision on certiorari, and in so doing presents a claim that the ruling below went beyond the statement of the question involved in the appeal below.

ARGUMENT.

POINT I.

Respondent's application for leave of absence constituted application for re-employment within the meaning of Section 8 (b) (3) of the Selective Training and Service Act of 1940.

Reemployment does not necessarily mean an immediate return to actual labor, but rather the resumption of the employee status and the master-serveant relationship, just as employment does not necessarily mean actual labor, but rather the employee status and the master-servant relationship.

> "Employment: Act of employing, state of being employed; as, to seek employment." *Webster, New International Dictionary.*
>
> "Employee: The word 'employee' as used in this Chapter, means a worker in his relation.
>
> (a) to the employer by whom he is employed, whether he is actually working or is on leave or is temporarily laid off, and
>
> (b) during a strike or lockout, to the employer by whom he was employed and against whom he is on strike or by whom he is locked out." *Restatement, Law of Torts, §776.*

It is common industrial practice for employees to secure from their employer a leave of absence, during which they remain as employees, and retain all benefits, such as seniority, group insurance and the like, flowing from the employ-

ment status. The same is true when an employee is "laid off", which in industrial parlance has the fully understood meaning of temporary cessation of work, during which remuneration ceases, but which does not terminate the employment relationship.

The familiar doctrine that one injured going to or from work, but not actually at work has sustained a compensable injury, is based upon the principle " * * * that the terms 'work' and 'employment' are not synonymous."

Grady v. *Nevins Church Press Co.*, 15 N. J. Misc. 190;
Terlecki v. *Strauss*, 85 N. J. L. 454.

As the court said, in

Scott v. *Payne Brothers*, 85 N. J. L. 446,

> "Employment within the meaning of the [Workmen's Compensation] statute refers rather to the contract than to the labor done in pursuance of the contract."

The meaning of the term "employment" has frequently arisen in determining whether group life insurance policies covering only employees, apply to one who at the time of his death was not regularly working. In such cases the courts have unanimously held that the term "employment" refers to the status and to the relationship, which may continue although the employee is not regularly working at the time of his death.

Emerich v. *Conn. General Life Insurance Co.*, 120 Conn. 60; 105 A. L. R. 413;
Perkins v. *Eagle Lock Co.*, 118 Conn. 658;

Pearson v. *Equitable Life Assur. Soc.*, 212 N. C., 731;
Ambrose v. *Metropolitan Life Ins. Co.*, 18 N. J. Misc. 42.

In the *Ambrose* case the court said:

> "In the policy there are such phrases as: 'termination of employment;' 'ceased to be in its employ;' 'left said employment;' and 'while the employe is in the employ of the employer.' An examination of the policy evinces that these phrases refer to the existence of the relationship of employer and employe and to the status or position of the deceased in that regard at the time of his death. The word 'employment' is intended to indicate the status of the holder of the certificate in relation to his employer. The phrase 'termination of employment' assuredly does not mean the mere cessation of active service. This becomes at once apparent from the discovery in the policy of the following provision. 'Lay-off or Leave of Absence, of two months or less, shall not be considered, * * * termination of employment within the meaning of this Policy unless notification to the contrary shall have been given by the Employe to the Company, &c.' The policy obviously did not contemplate steady and constant service by the employes. An employe might only work one or more days in a fortnight and still continue to be in the employ of the company. The phrases previously quoted must mean such a termination of the relationship of employer and employe as will make applicable and effective all parts of the insurance contract."

Similar holdings are found in cases interpreting wills making bequests to employees.

Boyle v. *Howe*, 126 Fla. 662;
Cox v. *Brown* (Mo.) 50 S. W. (2d) 763.

See also the Federal cases holding that ships are engaged in the slave trade, although not carrying slaves when apprehended.

U. S. v. *Morris*, 39 U. S. (14 Pet.) 464, 475; 10 L. Ed. 543;
U. S. v. *Catherine*, 25 Fed. Cas. 332, 338.

It is familiar law that striking employees do not sever the employment relation solely because they are not working.

Mengel v. *Justices of the Superior Court*, 313 Mass. 238;
MacPherson Hotel Co. v. *Smith*, 129 N. J. Eq. 167

It is true, as petitioners state on page 10 of their brief, that the statute "specifically states that an employee shall be considered as having been on furlough or leave of absence during his period of training and service." However, that does not change the fact that when Grasso asked his employer for a leave of absence he thereby asked for the resumption of his employment relation with petitioners. By so asking, respondent sought to transfer the leave of absence created by statute into restoration to full employment, plus a leave of absence created by agreement between himself and his employer.

The court below recognized that fact, and said:

> "Obviously, to ask for a leave would imply that the one making such a request was presently employed in a job from which the leave is sought. My view of it is that such a request amounts to nothing more

than asking the employer to simultaneously reinstate the applicant and give him an immediate vacation." (A. 58a).

One does not ask for a leave of absence from a job unless he holds the job.

POINT II.

Petitioners may not escape their obligation under Section 8 (b) (3) of the Selective Training and Service Act merely because respondent did not press his application for re-employment after being advised by petitioners' agent that he was physically unable to perform the duties of his job.

When Grasso made his request for reinstatement and vacation, petitioners understood the request. They did not overlook the implications of either of the two points therein involved. This is implicit in petitioners' treatment of respondent's application for the leave of absence. Crowhurst required Grasso to follow the procedure fixed by the collective bargaining agreement as to the request *of an employee* for a leave of absence. He sent Grasso to the company physician for examination.

Dr. Crecca examined Grasso and rendered a totally erroneous report. He advised both the petitioners and the respondent that respondent was unable to perform the duties of his job. Observe that petitioners did not merely make the granting of a leave of absence dependent upon the doctor's report; *they made the entire request for reem-*

ployment dependent upon Dr. Crecca's report. That report was not that Grasso should not get a leave of absence, but that Grasso should not be permitted to work at all.

On what was Dr. Crecca to report? Only on Grasso's physical condition. He might conceivably have reported, (1) that Grasso's general condition was such that no vacation or period of recreation was needed; or (2) that while Grasso was fit for his job, his general condition was such as to justify a period of rest or recreation; or (3) that his physical condition was such that he could not then, nor at any time in the foreseeable future, ever be able to resume his job.

If the doctor had given the first answer, petitioners' course would have been to inform Grasso that his job was waiting for him provided he actively assumed his duties at once.

Following the second possible answer, petitioners would still have been legally justified in insisting on immediate return to work, but would have been perhaps morally obligated to grant job restoration and also allow the recreational period asked for.

But the doctor gave Answer No. 3. Accordingly, petitioners refused both parts of respondent's request, both the request for restoration to his employment and the request for vacation.

When Dr. Crecca told Grasso that he could not work at all he was acting as the chosen agent of the petitioners. In legal effect it was the petitioners who informed Grasso that he could not work because of his physical condition. And

petitioners openly declare that they did not re-employ Grasso because of Crecca's report (A. 31a; 9a; par. 4 of Answer to Petition).

Thereupon Grasso, acting on Dr. Crecca's statement, which was chargeable against petitioners, made no further move toward obtaining his desired reemployment. Instead, as the court below found, he withdrew. That was not a voluntary withdrawal. It was not a deliberate, knowing relinquishment by Grasso of his rights under the Act. It was clearly impelled solely by reliance on the false reports given him by petitioners respecting his physical condition (A. 36a, 38a, 40a, 47a).

What if Dr. Crecca had rendered a true report and had advised Grasso that he was perfectly capable of performing his duties on the job? Plainly, Grasso would not under those circumstances have come back and said "Well, that's that" (A. 40a) and that Dr. Crecca had said he was in no condition to work (A. 47a) and that he wanted papers to get some other job for which he was capable.

It is very evident that petitioners did in fact tell Grasso that they would not re-employ him. They did so by informing him that his physical condition made it impossible for them to put him back on his job.

To permit this veteran's employer to create (by erroneous, improper or untruthful statements) the conditions which induced the veteran to withdraw from his request for re-employment and then to deny him re-employment because he has so withdrawn, is scarcely to effectuate the Congressional intent to secure to the veteran his old job

provided he makes timely indication that he wants it and is still able to perform it.

If the rights of the veteran are not to crumble before the innumerable variety of technical and legalistic defenses which recalcitrant employers can always find in the complex relationship surrounding industrial employment, the right of this veteran to re-employment must be upheld.

POINT III.

The Circuit Court committed no error in respect to the trial court's Finding of Fact No. 19.

Petitioners urge that the Circuit Court erred in "setting aside" the District Court's Finding of Fact No. 19. It is familiar doctrine that the court speaks through its orders and decrees only. We are not aware of any order or decree "setting aside" Finding of Fact No. 19. Petitioners' real objection is that the end result of the Circuit Court's ruling appears to petitioners to be in variance with Finding of Fact No. 19, and that, so petitioners state, "throughout the trial both sides assumed" the accuracy of the statements set forth in Finding of Fact No. 19. This claim is not substantiated by the record, and no reason appears why petitioners should hazard such a guess as to what was in respondent's mind.

The essential ruling of the trial court was solely that the form of Grasso's application for re-employment was such as did not amount to a request for re-employment within the meaning of the statute. The propriety of that

ruling was placed squarely in issue before the Circuit Court, which reversed. The Circuit Court did not go beyond the scope of the issue presented to it on appeal.

Conclusion.

Petitioners having failed to demonstrate either error or the probability of error in the ruling of the Circuit Court, the petition for writ of certiorari should be denied.

Respectfully submitted,

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